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No. 03-770

Supreme Court, U.S.
FILED
JAN 30 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NORMA CAREY,

Petitioner,

v.

KNOX COUNTY, TENNESSEE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS KNOX COUNTY, TENNESSEE; TIMOTHY HUTCHISON, SHERIFF OF KNOX COUNTY, TENNESSEE, IN HIS OFFICIAL CAPACITY; AND OFFICER JASON HELTON IN HIS OFFICIAL CAPACITY

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QUESTIONS PRESENTED

I. Whether the Petitioner has stated compelling reasons for granting certiorari where the Sixth Circuit's decision is harmonious with the relevant decisions of this Honorable Court, namely, *City of Canton v. Harris*, 489 U.S. 378 (1989), *Board of Comm'rs of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 435 (1997) and *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

II. Whether the Petitioner has stated compelling reasons for granting certiorari where the Sixth Circuit's decision is not in conflict with the decisions of other United States Courts of Appeals and is harmonious with its own precedent on the same important matter.

III. Whether Petitioner has identified an important question of federal law that needs to be settled by this Honorable Court.

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner correctly describes herself at page ii of her petition.

Respondents

Petitioner correctly describes Knox County, Tennessee. Sheriff Timothy Hutchison's name is spelled Hutchison. If Jason Helton is a party to this action, he is a party respondent only in his official capacity. Mr. Helton is not a party respondent in his individual capacity inasmuch as petitioner, in her capacity as plaintiff in the District Court, dismissed her claims against Officer Helton.

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U.S. Sup. Ct. R. 10 10

Respondent opposes the petition for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case and respectfully requests that the petition be denied.

STATEMENT OF THE CASE

This case arises out of the death of Warren Brad Carey on January 3-4, 1999. Norma Carey filed a civil rights lawsuit under 42 U.S.C. § 1983 alleging that the death of Warren Brad Carey, her son, occurred under color of state law, because of the actions of Corrections Officer Jason Helton in his individual and official capacity, and as a direct and proximate result of Knox County's and Sheriff Hutchison's defective policy, lack of policy, and/or inadequate training of correctional officers regarding mentally ill inmates.

Norma Carey filed her lawsuit in the United States District Court for the Eastern District of Tennessee on October 21, 1999, against Knox County, Tennessee, Sheriff Tim Hutchison in his official capacity, and correctional officer Jason Helton in his individual and official capacity (hereinafter, "Knox County").[1]

On motion for summary judgment, Knox County argued that no training or lack of training or Knox County policy or a lack of policy caused any deprivation of the civil rights of Warren Brad Carey or proximately caused the death of Warren Brad Carey.

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1. Suing a public official in his official capacity for acts performed within the scope of his authority is equivalent to suing the governmental entity itself. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

The District Court granted Knox County's motion for summary judgment, dismissed all individual claims asserted by Norma Carey and all federal claims against Knox County and declined to exercise supplemental jurisdiction over Plaintiff's state law claims. The District Court dismissed the § 1983 claim against Knox County, Tennessee, holding that

> In any event, the Court need not conclude there is no genuine issue of material fact as to whether the training program was adequate, for Plaintiff has not presented sufficient evidence to create an issue as to whether Knox County could be deemed to be callous and indifferent to the need for training on the handling of mentally ill inmates. Knox County's internal investigation of Decedent's death criticized Defendant Helton's use of force as a violation of Department policy. Unlike the situation in *Russo*, however, the report did not otherwise fault the Jail staff's handling of Decedent. Moreover, again unlike *Russo*, there is evidence Knox County maintained procedures for handling mentally ill inmates and conducted at least rudimentary training for its correctional officers on these procedures. The Court does not doubt the training could be improved. But this is not the test. What is relevant is that the Jail staff was in the process of moving Decedent to the medical unit (according to the Department's procedures) when the most violent confrontation between Decedent and Defendant Helton occurred. This evidence, even in the face of the criticism leveled by Plaintiff's expert, distinguishes the case from *Russo*. The unfortunate reality is that even additional or better training might not have prevented Defendant Helton's allegedly unconstitutional conduct.

> At the same time, Plaintiff has presented no evidence suggesting Knox County should have known Defendant Helton was prone to using excessive force or treating mentally ill inmates poorly. Indeed, unlike *Leach*, there is no evidence Knox County had notice of a pattern of mistreatment of mentally ill inmates by any correctional officers at the Jail. On the contrary, Plaintiff alleges only mistreatment by Defendant Helton. Under the holdings of *Harris* and *Sargi*, such circumstances will not support a finding that Knox County's training was deliberately indifferent to the constitutional rights of inmates and constituted an official policy. Accordingly, the court will GRANT Defendant Knox County's motion for summary judgment as to Plaintiff's § 1983 cause of action.

[Petitioner's Appendix D at 29a-30a].

Following the entry of the District Court Order, Norma Carey voluntarily dismissed her claims against Officer Helton in his individual capacity and filed a timely appeal to the United States Court of Appeals for the Sixth Circuit.

THE SIXTH CIRCUIT'S OPINION

The Sixth Circuit affirmed the judgment of the District Court, per curiam. The Sixth Circuit concluded "without hesitation"

> that the district court was legally correct in granting summary judgment to the defendants on Norma Carey's claims against the county and the other two defendants in their official capacities

> because plaintiff offered no significant probative evidence that the county maintained an affirmative policy regarding the handling of mentally ill detainees that led to the use of excessive force against the decedent. Moreover, despite the fact that the plaintiff's failure to train claim presents a closer question, we agree with the district court's holding that the record fails to establish an issue of fact as to whether the county was liable under the standard set out in *City of Canton v. Harris*, 489 U.S. 378 (1989).

[Petitioner's Appendix B at 6a-7a]. The Sixth Circuit explained the law on municipality liability and failure to train claims thusly:

> Because a plaintiff cannot rely on *respondeat superior* to hold a municipality liable under § 1983, *see Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), she must show that the municipality's policy (or lack thereof) was a "moving force" in the deprivation of the plaintiff's rights. *See Doe v. Claiborne County*, Tennessee, 103 F.3d 495, 508 (6th Cir. 1996). Likewise, to prevail on a failure-to train claim under § 1983, the plaintiff must prove: "that a training program is inadequate to the tasks that the officers must perform; that the inadequacy is the result of the city' deliberate indifference; and that the inadequacy is 'closely related to' or 'actually caused' the plaintiff's injury." *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989). Liability cannot be imposed unless "the need for more or different training is so obvious, and the

> inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the [governmental body] can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. 378, 390.

[Petitioner's Appendix B at 7a]. In commenting on the evidence presented on the adequacy of training, the Sixth Circuit stated:

> On the question of adequacy of training, the defendants presented the testimony that Knox County followed the guidelines of the Tennessee Corrections Institute dealing with special needs inmates, which included treatment of emotionally or psychologically disturbed persons. The defendants also produced an instructor's guide describing various psychological disorders that officers are likely to encounter in inmates and guidelines for handling mentally ill inmates. Norma Carey did not provide any evidence that directly refuted testimony that these instruction materials were in fact used. Although Officer Helton testified that he did not remember any training specifically regarding mentally ill detainees, such testimony, standing alone, has been held insufficient to defeat summary judgment. *See Russo v. City of Cincinnati*, 953 F.2d 1036, 1049 (6th Cir. 1992) (Willford, J., concurring); *see also Sova v. City of Mt. Pleasant*, 142 F.3d 898, 904 (6th Cir. 1998) (upholding grant of summary judgment for defendants on failure-to-train claim where "[t]he record shows that all the officers had received extensive training" and

> noting that "[a]llegations that a particular officer was improperly trained are insufficient to prove liability"); *City of Canton*, 489 U.S. at 390-91 ("That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted form factors other than a faulty training program.").

[Petitioner' Appendix B at 7a-8a]. Finally, the Sixth Circuit concluded:

> Even if we were to find that the plaintiff had created a genuine issue of material fact as to the adequacy of the County's training, the district court correctly concluded that the plaintiff failed to produce sufficient evidence to create an issue "as to whether Knox County could be deemed to be callous and indifferent to the need for training on the handling of mentally ill inmates." The district court rested its conclusion in part on the fact that no evidence had been presented regarding a pattern of similar violations in the past by the department, nor any evidence that Helton was prone to using excessive force against mentally ill inmates or inmates in general. As to the third factor, the district court did not directly address the issue of causation. But neither did the plaintiff, although she asserts on appeal that inadequate training regarding mentally ill inmates caused Helton's use of excessive force against Carey, she has not spelled out in the district court or in her brief before this court her theory regarding a crucial question in the causation chain:

> "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *City of Canton*, 489 U.S. at 391. This deficiency alone would establish a sufficient basis for the entry of summary judgment in favor of the defendants.

[Petitioner' Appendix B at 8a-9a].

STATEMENT OF THE FACTS

The Sixth Circuit summarized the facts as follows: Brad Carey had been arrested for reckless driving and disorderly conduct when he came in contact with Officer Helton during the intake process at the Knox County jail. Unbeknown to the Knoxville officers, Carey was psychotic at the time, suffering through a manic period, and at the jail he became highly uncooperative and self-destructive, banging his head against a plexi-glass wall. To subdue Carey, Helton admittedly delivered a series of knee strikes—Helton says he aimed the blows at Carey's legs in an attempt to bring him down, but the plaintiff alleges that the blows landed on the upper part of Carey's body. After Carey was put in his cell, the jail officials received a call from his mother, explaining that her son was mentally ill and had been off his medication for a matter of weeks. As a result, the officer on duty directed the jail staff to move Carey to the medical unit for observation an devaluation. Carey, predictably, resisted and again had to be subdued. [Petitioner's Appendix B at 5a].

Once in the medical unit, Carey was in such obvious physical distress that an emergency call was issued to transport Carey to the hospital. When the emergency medical personnel arrived, Carey was unconscious, had no pulse and had no discernible heartbeat. He was pronounced dead the following day, from a heart attack. [Petitioner's Appendix B at 5a].

The medical examiner concluded that Carey had died of natural causes associated with atherosclerotic heart disease, commonly referred to as hardening of the arteries. The autopsy report also noted the presence of various injuries, contusions, and abrasions to the decedent's chest, head, and face. [Petitioner's Appendix B at 5a-6a].

The plaintiff offered the testimony of a former state medical examiner, who speculated, based on the autopsy report, that Brad Carey's death was actually caused by the blows that he received while struggling with the officers, which "caused his blood pressure to go up," in turn causing . . . transient hypertension, which caused at least one of the capillaries or small blood vessels running through the plaque to rupture causing acute hemorrhage, bleeding, into the plaque, and the plaque swelled because of this accumulation of blood, and the swollen plaque blocked the lumen or the hold through which blood runs in the center of the artery such that blood did not flow to the heart muscle that it needed to and it caused the heart muscle to have a shortage of oxygen and to become ischemic; that is, to show changed consistent with loss of oxygen, and the caused the initial phases of a heart attack, and that this heart attack in and of itself is the immediate cause of his death. [Petitioner's Appendix B at 6a].

Although this medical examiner opined that Brad Carey's heart attack was ultimately the result of "blunt trauma,"[2] it is not clear from the record how he was able to distinguish between Carey's self-inflicted injuries, those necessarily suffered as he resisted the actions of the officers, and those alleged to have been the product of excessive force. [Petitioner's Appendix B at 6a].

Finally, although an expert witness for the plaintiff testified that the training materials were inadequate, this testimony was too conclusory to defeat summary judgment. [Petitioner's Appendix B at 8a].

REASONS FOR DENYING THE PETITION

I. The Petitioner has not stated compelling reasons for granting certiorari where the Sixth Circuit's decision is harmonious with the relevant decisions of this Honorable Court, namely, *City of Canton v. Harris*, 489 U.S. 378 (1989); *Board of Comm'rs of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 435 (1997); and *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985).

The Sixth Circuit correctly affirmed the summary judgment in Knox County's favor consistent with this Court's previous decisions under 42 U.S.C. § 1983 regarding claims of inadequate training. *City of Canton v. Harris*, 489 U.S. 378 (1989); *Board of Comm'rs of Bryan County, Oklahoma*

2. This medical examiner hypothesized, "In my opinion, the blunt trauma does not directly produce Mr. Carey's death. What it does is it causes his blood pressure to go up, and then the two things, the high blood pressure caused by the trauma and the arteriosclerosis in conjunction causes death." This medical examiner acknowledged that hypertension can be caused by someone being excited or in an agitated state.

v. Brown, 520 U.S. 397 (1997); and *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985).[3] The Sixth Circuit did not contravene this Court's precedent. Rather, the Sixth Circuit properly stated the rule of law.[4]

In *City of Canton*, this Court stated that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). In *City of Canton*, this Court held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388. "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have

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3. Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). As this Court has stated, "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

4. Petitioner attempts to challenge factual findings and the application of a properly stated rule of law. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10. The Sixth Circuit correctly stated the proper rule of law regarding claims of inadequate training under 42 U.S.C. § 1983. Even if the Sixth Circuit misapplied the law, certiorari is not favored on those grounds. It cannot be said that the Sixth Circuit's factual findings are erroneous.

resulted from factors other than a faulty training program." *City of Canton*, 489 U.S. at 390-91. As this Court said further about liability:

> Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

City of Canton, 489 U.S. at 391. In *City of Canton*, this Court said further that the identified deficiency in the training program must be closely related to the ultimate injury, which means that the plaintiff "must still prove that the deficiency in training **actually caused** the police officers' indifference to her medical needs." *City of Canton*, 489 U.S. at 391.

In *City of Canton v. Harris*, 489 U.S. 378 (1989), this Court examined several issues. One issue is whether the training program is adequate in light of the duties the officer would reasonably be expected to perform. *City of Canton*, at 390. A second issue concerned whether "the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the . . . [sheriff's department] can reasonably be said to have been deliberately indifferent to the need." *Id.*

It is not sufficient, however, for the Plaintiff to show only that an injury could have been avoided if an officer had better training, but that something more is required before a court may "condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal." *Id.* at 391.[5] Finally, the Plaintiff must also demonstrate that the deficiency in training **actually caused** the officer's indifference to the medical condition. *Id.* In this regard, this Court observed that

> [p]redicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the fact finder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances.

Id.[6]

Under *City of Canton v. Harris*, 489 U.S. 378 (1989) "inadequacy of police training may serve as the basis for § 1983 liability **only where** the failure to train amounts to

5. "It may be, for example, that an otherwise sound program has occasionally been negligently administered." *Canton*, 489 U.S. at 391, 109 S. Ct. at 1206. Negligence does not give rise to a civil rights violation under § 1983.

6. To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident.

Canton, 489 U.S. at 392, 109 S. Ct. at 1206.

deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 387 (emphasis added). Inaction in the face of **often repeated** violations can be said to be deliberate indifference. *City of Canton*, 489 U.S. at 390 n.10 One incident is not proof of either inadequate training or deliberate indifference. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985).

Deliberate indifference is a stringent standard, requiring proof that the governmental entity disregarded a known or obvious risk. *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997). As the Supreme Court stated in *Bryan County*,

> If a program does not prevent constitutional violations, municipal decision makers **may eventually** be put on notice that a new program is called for. Their continued adherence to an approach they know or should know has failed to prevent tortuous conduct by employees may establish the conscious disregard for the consequences of their action – the "deliberate indifference" – necessary to trigger municipal liability, (emphasis added).

Bryan County, 117 S. Ct. at 1390. A municipality may be held liable for inadequate training of its officers under § 1983 only if "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388-89, 109 S. Ct. 1197, 1204-05 (1989).[7]

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7. A county is not automatically liable under § 1983 if one of its employees happened to apply a policy in an unconstitutional manner, for, in that instance, liability would then rest on *respondeat superior*, which is not available under § 1983. *City of Canton*, 489 U.S. at 387, 109 S. Ct. at 1204.

Lack of action[8] or lack of policy is not sufficient to confer liability on a governmental entity under 42 U.S.C. § 1983.[9] Under *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989) the evidence must show that the need to act is so obvious that the government's "conscious" decision not to act can be

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8. It should be noted that the Knox County Sheriff's Department disciplined Officer Helton for the inappropriate knee strikes. It cannot be said that the Department took no action. After the District Court granted summary judgment to Knox County, Petitioner voluntarily dismissed her action against Helton in his individual capacity.

9. Petitioner urges that a cause of action should exist under 42 U.S.C. § 1983 against a governmental entity for a lack of policy and that this is the proper case for such a finding. Petitioner is mistaken because this is not a lack of policy case. As the District Court found, the Knox County Sheriff's Department had a General Policy and Procedure Manual which had a General Medical Services subsection which included procedures concerning the provision of mental health services to inmates. These procedures included screening; observing unusual responses to questions or behavior; housing a stable inmate with mental health problems in the special needs pod with referral to a mental health center for follow up services while incarcerated; housing a combative and uncooperative inmate in the therapeutic isolation room and calling Mobile Crisis to evaluate the inmate for emergency placement at a mental health facility with further follow-up. [Petitioner's Appendix D at 17a-18a]. The District Court found that

> [w]hat is relevant is that the Jail staff was in the process of moving Decedent to the medical unit (according to the Department's procedures) when the most violent confrontation between Decedent and Defendant Helton occurred. This evidence, even in the face of the criticism leveled by Plaintiff's expert, distinguishes the case from *Russo*.

[Petitioner's Appendix D at 29a].

said to amount to a "policy" of deliberate indifference to [plaintiff's] constitutional rights. *City of Canton*, 489 U.S. at 389. "Deliberate indifference" in this context does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference to the civil rights in question. *Id.*

In opposing Knox County's motion for summary judgment, Petitioner failed to produce more than a scintilla of evidence indicating that Carey's death was actually caused by Knox County's actions and not by Carey's atherosclerotic heart disease. Petitioner also failed to produce more than a scintilla of evidence that Knox County was deliberately indifferent to the need for training or policy on the handling of mentally ill inmates. Petitioner did not produce sufficient evidence to create a material issue of fact as to either causation or deliberate indifference.

Summary judgment cannot be defeated by "the mere existence of a scintilla of evidence in support of the plaintiff's position . . . ; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Under the well-established summary judgment standards of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Sixth Circuit correctly affirmed the summary judgment in Knox County's favor.

II. The Petitioner has not stated compelling reasons for granting certiorari where the Sixth Circuit's decision is not in conflict with its own precedent or the decisions of other United States Courts of Appeals on the same important matter.

A. The Sixth Circuit was not compelled by its own precedent to reverse the summary judgment in the instant case.

Petitioner contends that the Sixth Circuit has violated its own precedent in *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992). In *Russo*, a divided panel reversed the summary judgment of the district court. The facts in *Russo* are distinguishable from the instant case and thus the Sixth Circuit was not compelled by its decision in *Russo* to reverse the summary judgment here.

In *Russo*, a paranoid schizophrenic had "barricaded" himself in his own apartment. After failing to impair him with Taser darts, three officers shot him twenty-two times. He was armed only with a knife. The underlying facts in *Russo* involving the use of deadly force appear to have influenced the Sixth Circuit to reverse the district court's grant of summary judgment for the city. In *Russo*, it appeared that in-service training about mentally ill persons was non-existent. Unlike the instant case, in *Russo*, the plaintiff's expert opinion, though conclusory, was supported by the additional fact that the City of Cincinnati's Office of Municipal Investigation had concluded that "recruit training regarding the mentally ill appear[ed] inadequate, in-service

training . . . [was] virtually non-existent. . . ." *Russo*, 953 F.2d at 1041.[10]

Unlike *Russo*, in the instant case, petitioner offered only a purported expert's conclusory opinion[11] Knox County Internal Affairs made no finding about training. In contrast

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10. In an unpublished opinion in 1997, *Trent v. Hawkins County, Tennessee*, 106 F.3d 402, 1997 WL 35574 (6th Cir. 1997), Judge Nelson commented on *Russo*. In *Trent*, the court upheld the summary judgment for Hawkins County in a civil rights case brought by a mentally ill person who was shot in the leg while being taken into custody by three deputy sheriffs. The issue was training. Ironically, the Plaintiff in *Trent* employed the same expert employed in *Russo*. Judge Nelson observed that Judge Wellford's vote in *Russo* was the deciding one, Judge Suhrheinrich having dissented. Commenting on Judge Wellford's concurring opinion, Judge Nelson stated

> [w]e take it from his concurring opinion that Judge Wellford would have opted to affirm the summary judgment for the defendants if the plaintiffs had been unable to point to anything more than the testimony of . . . [the expert]. **In the case at bar, . . . [the expert's] affidavit is essentially all the plaintiff has.** Here, there is nothing comparable to the report of the Office of Municipal Investigation, for example. Judge Wellford would probably characterize the present case as a close and difficult one too – a characterization with which we would agree – but the logic of Judge Wellford's concurrence in *Russo*, as we read it, points to affirmance of the judgment for the defendants in the case at bar."

1997 WL 35574 at 4-5.

11. Petitioner's training expert does not show that Knox County's training and policy created a known risk or an obvious, highly probable risk.

and in support of its motion for summary judgment, Knox County offered substantial evidence about its training of new recruits by offering the lesson plans and materials provided regarding mentally ill persons; on-going 40 hour in-service training annually; its certification by ACA, and that its training follows the guidelines of TCI. These are facts Petitioner did not dispute or did not dispute successfully in her opposition to summary judgment.[12] Knox County also

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12. Petitioner did not dispute the following: (1) that Knox County Detention Facility's Policy and Procedure Manual is in compliance with the American Correctional Association accreditation standards or that the Detention Facility was accredited by ACA in 1996; (2) that Knox County's training curriculum for new correctional officers is based on the Tennessee Corrections Institute; (3) that with respect to training in the treatment of emotionally disturbed inmates, Knox County follows the guidelines of TCI for special needs inmates; (4) that Knox County has a medical protocol for mentally ill inmates that was developed in cooperation with the detention facility physician and a physician and licensed clinical social worker from Helen Ross McNabb Center; or (5) that a procedure is in place to call Mobile Crisis to come to the facility to evaluate the inmate who displays mental health problems. In an attempt to create an issue of fact, albeit not a material fact, Petitioner argued that the proof is inconclusive that the Helen Ross McNabb professionals spoke to the corrections officers, as opposed to the medical staff, about mentally ill inmates. Administrative choices about who conducts the training does not give rise to a civil rights violation. As Circuit Judge Suhrheinrich reminded the court in his dissent in *Russo v. City of Cincinnati*, 953 F.2d 1036, 1050 (6th Cir. 1992),

> Claims of inadequate training test fundamental considerations of judicial restraint. First, when a federal court reviews municipal or state executive conduct or policy . . . it must be very careful not to violate principles of federalism. Second, the federal judiciary must remain

(Cont'd)

offered substantial evidence about its policy regarding the treatment of mentally ill inmates.[13] The Sixth Circuit was not compelled by *Russo* to reverse the summary judgment in the instant case. As the District Court found

> [w]hat is relevant is that the Jail staff was in the process of moving Decedent to the medical unit (according to the Department's procedures) when the most violent confrontation between Decedent and Defendant Helton occurred. This evidence, even in the face of the criticism leveled by Plaintiff's expert, distinguishes the case from *Russo*.

[Petitioner's Appendix D at 29a]. Given that the facts in *Russo* are distinguishable from the facts in the instant case, the Sixth Circuit did not violate its own precedent in affirming the summary judgment in the instant case.

(Cont'd)

> ever-mindful of its limited competence regarding executive functions, such as the formulation and administration of training programs.

Id.

13. The District Court found that the Knox County Sheriff's Department had a General Policy and Procedure Manual which had a General Medical Services subsection including procedures concerning the provision of mental health services to inmates. These procedures included screening; observing unusual responses to questions or behavior; housing a stable inmate with mental health problems in the special needs pod with referral to a mental health center for follow up services while incarcerated; housing a combative and uncooperative inmate in the therapeutic isolation room and calling Mobile Crisis to evaluate the inmate for emergency placement at a mental health facility with further follow-up. [Petitioner's Appendix D at 17a-18a].

B. The Sixth Circuit properly exercised its gate-keeping function in evaluating petitioner's expert evidence.

In performing its gate-keeping function when evaluating expert evidence, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Electric Co. v. Joiner*, 522 U.S. 136, 146, (1997); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) (expert evidence admitted should not only be relevant, but also reliable).

Petitioner's training expert conclusorily stated that Knox County's training materials "contain so little meaningful assistance to a new officer, that to teach from these documents exhibits deliberate indifference . . ." Petitioner's expert further stated in conclusory terms that Knox County's reliance upon the Policy and Procedures Manual "constitutes deliberate indifference to the rights and safety of mentally ill or emotionally disturbed persons. . . ." These statements iterated only a ready-made legal conclusion instead of reliable and relevant information to properly oppose a motion for summary judgment.

The "expert's" legal conclusion that Knox County acted with deliberate indifference is erroneous because he did not base that opinion on facts sufficient under the law governing municipality liability under 42 U.S.C. § 1983. The "expert" did not identify any prior incidents where mentally ill persons were mistreated by Knox County in the Detention Facility or Jail such that Knox County was on notice that its policies or training were inadequate nor did he identify any prior incidents of misconduct on the part of Defendant Helton such that Knox County was on notice that Officer Helton would

not follow policy or training or would, arguably, use excessive force. The "expert's" opinion contravenes *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427 (1985) (rejected a jury instruction that a single excessive use of force may warrant an inference that it was attributable to inadequate training or supervision amounting to deliberate indifference on the part of the government); *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989) (plaintiff must prove that the identified deficiency in the training program was the actual cause of plaintiff's constitutional injury; federal courts are not to become involved in an endless exercise of second-guessing municipal employee-training programs); *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997) (deliberate indifference is a stringent standard requiring proof that the governmental entity disregarded a known or obvious risk). It is well settled that deliberate indifference cannot be found on the basis of one incident. *Tuttle*, 471 U.S. at 820. Petitioner's expert cited no incident other than the one giving rise to the instant case and offered no evidence of a consistent or pervasive pattern of either unconstitutional use of force on mentally disturbed inmates or unconstitutional treatment of mentally disturbed inmates by Knox County such that it amounts to the County being deliberately indifferent to the rights of mentally disturbed citizens incarcerated in the Knox County Jail.[14]

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14. Petitioner's "expert's" opinion that the use of force was excessive is also erroneous under the law. The Eighth Amendment, not the Fourth Amendment, governs the use of force issue in this case because Mr. Carey was a pre-trial detainee at the time of the events. *Whitley v. Albers*, 475 U.S. 312, 327 (1986). Under the Eighth Amendment standard, if the use of force was applied in a good-faith effort to maintain or restore discipline, there is no civil rights violation; the use of force is not excessive unless it was applied maliciously and sadistically to cause harm. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

Therefore, the Sixth Circuit correctly upheld the summary judgment where the District Court found that petitioner's proffer of the conclusory statements of an expert whose credentials are suspect did not create a material fact issue as to whether Knox County was deliberately indifferent to the need for training on the handling of mentally ill inmates.

C. The Sixth Circuit's decision is not in conflict with the decisions of other United States Courts of Appeal.

Petitioner argues that other circuits have found that "under certain circumstances" a law enforcements agency's failure to adequately train its officers may constitute a "policy" giving rise to governmental liability. For this proposition, petitioner cites *Rivas v. Freeman*, 940 F.2d 1491 (11th Cir. 1991); *Avery v. County of Burke*, 666 F.2d 111 (4th Cir. 1981); *Jeffes v. Barnes*, 208 F.3d 49 (2d Cir. 2000); *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175 (9th Cir. 2002).[15] Each of these cases is distinguishable from the instant case.

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15. Petitioner cites *Jones v. City of Chicago*, 787 F.2d 200, 204 (7th Cir. 1986) for the proposition that "in situations that call for procedures, rules or regulations, the failure to make policy itself may be actionable." The outcome in *Jones* does not support petitioner's position. *Jones* was a civil rights action against the city arising out of the sexual assault of two patients during gynecological examinations by the city health clinic physician. In *Jones*, the District Court entered summary judgment for the city and the Seventh Circuit affirmed. The Seventh Circuit held that absent specific evidence of prior incidents of sexual assault or of medical standards requiring: (1) the presence of a chaperone in the examination room; and (2) that the patient be informed of her right to have a chaperone

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In *Rivas*, a case of mistaken identity arrest, the evidence showed, unlike the instant case, that the Sheriff knew of prior instances of mistaken identity but allowed his deputies to detain individuals even where discrepancies existed.

In *Avery*, a troubling case which arose in North Carolina, the Fourth Circuit vacated a summary judgment in a case involving the sterilization of a minor who had been wrongfully diagnosed by the County Health Department with the sickle cell trait and urged by county nurses and social workers to be sterilized. The Fourth Circuit observed at the outset that the county is a proper and necessary party to resolve the minor's claim against the County Boards of Health and Social Services because neither the Board of Health nor the Board of Social Services was a legal entity separate and apart from the county, and if the minor was entitled to recover damages because of the boards' conduct, the county would be liable. The Fourth Circuit noted, however, that a single incident or isolated incidents are normally insufficient to establish § 1983 municipality liability.[16]

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present, city was not liable under 42 U.S.C. § 1983 to patient who first complained of sexual assault. The Court further held that the city's decision to clear physician of misconduct in connection with first-reported incident and failure to institute a formal policy requiring presence of a chaperone during gynecological examinations did not render city liable under civil rights statute to second patient.

16. Under North Carolina law both boards were required to promulgate guidelines and policies to protect the health and well-being of the citizens of the county. Furthermore, the state had recognized the prevalence of sickle cell syndrome as a matter of statewide and local concern and had specifically imposed on local
(Cont'd)

Jeffes arose out of a campaign of harassment, threats and intimidation by members of the Sheriff's Department against plaintiffs correctional officers in retaliation for their public disclosures of flagrant abuse of inmates and their assistance in an FBI investigation. Plaintiffs correctional officers brought civil rights claims under the First Amendment. Affidavits and dozens of depositions revealed: (1) the infliction of severe physical abuse on seven inmates at the jail, witnessed by plaintiffs correctional officers who then went to the FBI and made public disclosures; (2) incessant depiction of plaintiffs as "rats" and "snitches" on posters and in graffiti in the jail; (3) name-calling of plaintiffs in public areas and over walkie-talkies; (4) harassing telephone calls to plaintiffs; and (5) outright threats of physical harm to plaintiffs correctional officers. Without expressing any view on the overall merit of the plaintiffs' claims, the Second Circuit vacated the summary judgment as to the county, remanded the case to the district court and concluded as a matter of law that the Sheriff was the county's final policymaker with respect to the conduct of his staff members toward one another, which could suffice for the imposition of liability on the county after a trial on the merits.

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health departments the duty to provide testing and counseling for residents who may be afflicted. The evidence, read in the light most favorable to the minor, disclosed that the county had a substantial black population, that the sickle cell trait affects approximately 10% of the black population in the United States, that the board of health was involved in the sterilization of women, but that the board had no policies, rules or regulations for counseling and sterilizing persons believed to have the sick cell trait, such that these activities were by custom left solely to the standardless discretion of individual employees, and that in the case of this minor, the nurses who recommended sterilization had no special training in handling sickle cell cases and the social work assigned to counsel the minor about sterilization had only worked for the county for eight days.

In *Gibson*, which involved the death of a mentally ill inmate from a heart attack, the Ninth Circuit focused on the fact that the county had a written policy stating that "The Medical Screening process *will be delayed* if the inmate is combative, uncooperative or unable to effectively answer questions due to intoxication." *Gibson*, 290 F.3d at 1189. Because of this written policy, the Ninth Circuit reversed the summary judgment in part. In contrast, there is no evidence in the record that Knox County had a policy of delaying medical screening or assistance in such circumstances.

Because of the considerable factual differences between the foregoing cases and the instant case, it cannot be said that the Sixth Circuit's decision is in conflict with those of other Courts of Appeals on the same important matter.

III. Petitioner has not identified an important question of federal law that needs to be settled.

Read together, *Harris*, *Brown* and *Tuttle* have settled the important questions of federal law in connection with municipality liability under 42 U.S.C. § 1983 on the issues of inadequate training or policy. Likewise, *Anderson* and *Celotex* have long settled the summary judgment analysis. Thus, petitioner has not identified an important question of federal law that needs to be settled by granting certiorari in this case.

CONCLUSION

For the foregoing reasons, the Petitioner's Writ for Certiorari should be denied.

Respectfully submitted,

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